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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

NO. 71-337

MATTHEW DONALD JOHNSON, Petitioner,

v.

THE STATE OF TEXAS, Respondent.

NO.

MARION ERNEST McMILLAN, Petitioner,

v.

THE STATE OF TEXAS, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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The Petitioners Matthew Donald Johnson and Marion Ernest McMillan respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Criminal Appeals of Texas entered in this proceeding April 14, 1971.

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas, reported at 467 S.W.2d 247, appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Criminal Appeals of Texas was entered April 14, 1971. A timely motion for rehearing was denied without written opinion June 9, 1971, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether it was a denial of due process to refuse a change of venue in light of community hostility and fear of the defendants because of their Black militancy.

2. Whether it was a denial of due process, under the circumstances, to refuse voir dire examination of each veniremen separate from the others, authorized by Texas law.

3. Whether it was a denial of due process, under the circumstances, to restrict voir dire questioning about Black Power and militancy.

4. Whether Texas procedure with respect to jury prejudice and misconduct, as applied in these cases, is a denial of due process.

5. (McMillan only) Whether trial of McMillan for a felony was double jeopardy after he had already been placed under a peace bond, a criminal sanction under Texas procedure, for the same offense.

STATUTORY PROVISIONS INVOLVED

(Appendix, page 14)

STATEMENT OF THE CASE

Petitioners were convicted of destruction of property over the value of $50.00, a felony, in a joint jury trial. They are Negroes and at the time in question they were leaders of a small but active local chapter of the Student Nonviolent Coordinating Committee (SNCC). State's evidence showed that Petitioners, with from 30 to 50 other persons, Negroes, characterized by Afro haircuts and pseudo-African costumes, were in one of a chain of White-owned neighborhood grocery stores in a large Negro neighborhood in the City of Dallas, Texas. In some instances by overtly intentional acts of destruction, the group damaged produce and merchandise in the store of the value of approximately $100 to $200. Petitioners had previously received publicity in the community as leaders of SNCC, and they were identified as leaders of the group, which was known to be protesting the chain of grocery stores in question. The jury assessed punishment and Petitioners were sentenced to ten years confinement in the Texas Department of Corrections. Neither had prior conviction records and both were eligible for probation under Texas law.

The events occurred in July, 1968. The court will take judicial notice that there was wide spread tension between the White and Negro races in Texas and throughout the Nation, and it was a period of time when other cities were suffering race riots and violence. Petitioners, because of their activities as SNCC leaders, were known and controversial in the community, and they requested a change of venue because of the intensity of feeling toward them at the time of trial, August 19, 1968 (less than two months after the event, July 1, 1968, and hardly a month after indictment, July 15, 1968).

They similarly requested liberal voir dire procedures in an attempt to eliminate jury prejudice. Following the trial, they moved for a new trial on the basis of juror misconduct supported by the affidavit of a juror who said that comments made by other jurors indicated that they came into the jury box prejudiced against the Defendants. The motion was overruled.

The record shows the trial judge, who had been appointed to fulfill a vacancy, faced an opponent in the November election, 1968. The record shows these cases were transferred to his court, from another court with concurrent jurisdiction, on instructions by one of the prosecuting attorneys. The defense objected.

The court denied a defense motion for continuance of the trial, which occurred as scheduled in August, less than two months after the alleged crime.

There was no disquising Defendants' SNCC activities at the trial, because it was clearly related to the offense. Prosecution argument to jury made it clear that they were on trial for being SNCC leaders as well as for the offense charged (It is like saying, ladies and gentlemen, if SNCC decides to come out and burn your house . . .").

With an affidavit of a juror attached, defendants filed a motion for new trial alleging innate juror prejudice, concealed during voir dire, as well as misconduct in discussing race riots in other parts of the country (Affidavit, Record page 171-175). A hearing was scheduled, but the State's motion for continuance was granted. The hearing finally occurred, over defense objection that the motion was overruled by operation of law, and the motion was denied.

REASONS FOR GRANTING THE WRIT

1. THESE CASES PRESENT FOR DECISION ON THE MERITS THE PROCEDURAL QUESTION DECIDED IN GROPPI V. WISCONSIN (JANUARY, 1971).

Groppi v. Wisconsin, _____ U.S. _____, 27 L Ed 571, 91 S Ct _____ (No. 26, Decided January 25, 1971), held that the failure of Wisconsin law to provide even the possibility of change of venue in a misdemeanor case was a denial of due process under the circumstances. The case did not present the question of whether venue should have been changed but whether the statute was unconstitutional insofar as it absolutely denied change of venue in misdemeanor cases. The accused was notorious in Milwaukee County for his radical political activities. This Court held the Wisconsin statute was in violation of the Sixth Amendment right to trial by an impartial jury, made binding on the States by the Fourteenth Amendment Due Process Clause. It was not a ruling on the merits of whether venue should have been changed. Mr. Justice Blackmun makes this clear in paragraph nine of his concurring opinion, _____ U.S. _____, 27 L. ed. 2d at 572.

Other cases have held on the merits that failure to change venue constituted a denial of due process. In Rideau v. Louisiana, 373 U.S. 723 (1963), this Court reversed for failure of the judge to transfer the jury trial to a community where people had not seen the accused's televised confession. Failure to change venue was one of the shortcomings cited by this Court in reversing, for want of due process, in Sheppard v. Maxwell, 384 U.S. 333 (1966).

Rideau, however, is a pretrial publicity case; the evidence, his confession, was fully disseminated in the

community by television. Sheppard, a trial publicity case; the Court's failure to insulate the trial from the antics of the press made it a circus. Groppi is a community resentment case; it was less the nature of the crime charged (resisting arrest) than the disapprobation of Groppi himself - and his radical politics. But that decision set forth no standards for deciding when the degree of community disapprobation exceeds that point where failure to change venue is a denial of due process. The cases of these petitioners for certiorari, Johnson and McMillan, present squarely for decision the question - under what circumstances must venue be changed when the community from which the jury is drawn resents and fears the accused himself, regardless of his crime.

There is a complete record for the Court's decision on the merits. The defense moved to disqualify the judge because his rulings might be affected by his compaign for election, in view of the sensitive nature and public interest in these defendants. [See Sheppard v. Maxwell, 384 U.S. 333 (1966)]. There was a hearing; the election and the manner of transfer of the cases is in the record.

There was a full change of venue hearing. Although the evidence of community hostility is understated, the opinion of the Texas Court of Criminal Appeals is accurate (Appendix, page 3). Actual newspaper clippings were added to the record subsequently by motion to augment the record ("SNCC LEADERS CHARGED IN RAID ON STORE"; "The charges grew out of a July 1 raid by a band of Negro men and women . . ."; "SHOUTING MCMILLAN JAILED"; "JURY INDICTS SNCC CHIEF"; "JUDGE DENIES BID BY SNCC LAWYERS"; "RIOT ORDINANCE ADOPTED," etc.).

The defense sought continuances twice; the only motion for continuance granted was the State's - to postpone the post-trial hearing on jury prejudice. All the motions and

opposing motions are in the record, often supplemented by informal bills of exception dictated into the record.

The entire voir dire examination was transcribed. (The defense challenged the array for lack of Negroes.) All jury arguments were recorded.

Jury misconduct and prejudice is documented by a four page affidavit of a juror.[1] (See the dissenting opinion of Mr. Justice Black in Groppi v. Wisconsin, 27 L Ed 2d 571 at 577, wherein he states "the defendant can always be given a new trial on the grounds of jury prejudice.")

Sheppard v. Maxwell, 384 U.S. 333, and Mr. Justice Black, dissenting, in Groppi v. Wisconsin, 27 L Ed 2d 571 at 574-575, catalogue ways to to protect the right to trial by an impartial jury. In lieu of or in addition to change of venue, the trial court can use continuances, until community passions subside, and voir dire examination. If these fail, he can grant a new trial upon evidence of jury prejudice. In the cases of these petitioners, change of venue, continuance, liberal voir dire examination and new trial were all refused.

Petitioners' brief (a pleading in Texas procedure) in the Texas Court of Criminal Appeals clearly raised the Federal due process question with respect to venue, and it is clear

1. One lady juror, identifiable in the record because of her husband's occupation, said on voir dire that she had seen defendant McMillan on T.V. When questioned more specifically, she said that it would not affect her ability to be fair and impartial. The affidavit shows that the same woman confessed that she had told her husband she would seek the maximum against both defendants, when she knew she was on the jury. She told the jurors they would have hated McMillan if they, too, had seen the television program. A fair verdict was precluded when individual jurors offered their own testimony about what they had seen after the riot in Watts and other prejudicial information outside the record.

from its opinion that the Texas Court of Criminal Appeals ruled on the question (Appendix, p. 3-4, citing Sheppard v. Maxwell and Pamplin v. Mason, 364 f 2d 1, a Texas, Fifth Circuit, due process case which was a precursor to Groppi v. Wisconsin).

[In Texas criminal cases, the appellant must file his brief first with the trial court, who can grant a new trial before the case is docketed with the appellate court.]

2. IT WAS A DENIAL OF DUE PROCESS, UNDER THE CIRCUMSTANCES, TO REFUSE SEPARATE VOIR DIRE EXAMINATION OF EACH PROSPECTIVE JUROR OUT OF THE PRESENCE OF THE OTHERS.

In light of the facts brought out in venue hearing and the trial court's refusal to order a change of venue, the court should have exercised the discretion granted him by Art. 3517, TEX. CODE CRIM. PROC. (Appendix, page 15) to allow voir dire of each prospective juror beyond the hearing of the others. The court's refusal was a denial of due process. The due process question was raised in the original motion and thereafter.

3. IT WAS A DENIAL OF DUE PROCESS, UNDER THE CIRCUMSTANCES TO RESTRICT DEFENSE QUESTIONING ON VOIR DIRE EXAMINATION.

The federal due process question was clearly presented in petitioners' appellate brief (a pleading, filed first with the trial court), and the Texas Court of Criminal Appeals clearly ruled on it (Appendix, page 6).

4. THE TEXAS PROCEDURE FOR REVIEWING JURY MISCONDUCT WAS A DENIAL OF DUE PROCESS AS APPLIED IN THESE CASES.

An amended motion for new trial is overruled by operation of law twenty days after filing, according to statute and cases. Art. 40.05, TEX. CODE CRIM. PROC.; Brown v. State, 353 SW2d 425 (Tex. Cr. App. 1962); Brinkley v. State, 320 SW2d 855 (Tex. Cr. App. 1959).

In the cases of Johnson and McMillan, however, the court granted a continuance to the State, then contined the case again on his own motion until 51 days after the filing of petitioners' amended motion for new trial. This allowed the State to muster evidence against the point, including affidavits of two jurors who originally appeared to testify for the defense that the misconduct occurred. All of the facts are fully set out in the record.

Petitioners' raised the due process point at their first opportunity, in their appellate brief.

Granting the State privileges not theretofore available under the applicable law precluded a fair, timely hearing. Under Texas law the trial judge, in effect, can find that no misconduct existed unless it is undisputed. He alone decides this fact issue, Walton v. State, 398 SW2d 555 (Tex. Cr. App. 1966).

5. APPELLANT MARION ERNEST McMILLAN WAS PLACED TWICE IN JEOPARDY FOR THE SAME TRANSACTION IN COURTS WHICH SPRING FROM THE SAME ORGANIC LAW AND SUCH DOUBLE JEOPARDY VIOLATED HIS CONSTITUTIONAL RIGHTS GUARANTEED BY THE FIFTH AMENDMENT OF THE U.S. CONSTITUTION MADE APPLICABLE BY THE FOURTEENTH AMENDMENT.

The opinion of the Court of Criminal Appeal rejected Appellant McMillan's contention that he had been placed twice in jeopardy because "he had a hearing by a Justice of the Peace on a peace bond".

Appellant McMillan did not only have a hearing on a peace bond. The record clearly shows that he was actually placed under a peace bond, committed to jail and made post bond pursuant to the peace bond. This evidence was brought forward in the trial during the hearing out of the presence of the jury. During that hearing the manager of the store involved in this case testified that he had appeared before a Justice of the Peace, Precinct 7, Dallas County, and had sworn out a complaint for a peace bond and that there had been a hearing on that complaint before the Justice of the Peace which he attended and the Justice had placed Appellant McMillan under a peace bond. He testified that the facts which he swore out and the basis of that complaint was the same transaction which was the basis of the present indictment against Appellant McMillan.

Admitted into evidence was the Peace Bond Affidavit sworn out by the Complaintant Tallas in Cause No. 62582, Precinct 7, Place 1, Dallas County, filed July 12, 1968. The indictment was filed July 15, 1968. The commitment returned on Peace Bond No. 62582 signed by Constable T. A. Vines and noted in his handwriting that the commitment had been executed and the defendant was "placed in the County Jail at 3:20 p.m." July 12, 1968 and that

Ed Tallas, a State's witness, testified out of the presence of the jury at the close of testimony on August 21, 1968, as follows:

> Q. And you did not see him? Now, this -- strike that, I think I started half a question. Now, this July 1st, 1968 that you swore to on July 12th in Judge Richburg's Court is the same transaction that you testified to in your deposition and that you testified to today in open Court; is that correct?
>
> A. Yes. (R.891).
>
> Q. It wasn't a different transaction?
>
> A. No, it was the same July 1st. (R.891).

The State in open court stipulated that the Defendant McMillan was one and the same as was tried and convicted in Cause No. 62,582 in the Justice Court and was the same individual who was on trial in the case on trial before the Court.

Having a criminal offense, a single transaction, a judicial determination by a judge of concurrent jurisdiction, a reading to the jury of the Special Plea, the jury, who were the trier of the facts on the Special Plea on the trial of the merits have found said Special Plea true or untrue in accordance with Art. 37.07, Sec. 1, V.A.C.C.P. and to deny the defendant this right was error. Art. 27.07, V.A.C.C.P.

Art. 37.07(1), V.A.C.C.P. provides: "When there are special pleas on which a jury is to find, it must say in its verdict that the allegations in such pleas are true or untrue." Art. 27.07, V.A.C.C.P. provides: "All issues of fact presented by a special plea shall be tried by the trier of the facts on the trial on the merits." (Emphasis added.)

The Defendant McMillan established former jeopardy by a preponderance of the evidence and the issue became one for the jury to decide under the provisions of Art. 37.07(1), V.A.C.C.P.

The Supreme Court of the United States in Waller v. Florida, 397 U.S. 387 (1970) held that the same acts could not be punished as two offenses when the judicial power to try the defendant in the two courts sprang from the same organic law and both courts

the commitment ordered by the Court, Honorable W. E. Richberg, Precinct 7, Place 1. was included, and finally the peace bond itself signed by Appellant McMillan to secure his release on July 17, 1968, was entered in the evidence.

Appellant McMillan filed a properly sworn special plea prior to trial; the court allowed him to read his special plea to the jury in accordance with Texas law; but the court refused Appellant McMillan's special requested charge to the jury that they find as a fact whether the peace bond proceedings constituted a former conviction. The court subsequently overruled Appellant McMillan's Motion for New Trial and Motions in Arrest of Judgment on this point.

As a matter of law Appellant McMillan is entitled to acquittal because placing him a second time in jeopardy for the same transaction in courts which spring from the same organic law and which are arms of the same sovereign is contrary to his constitutional rights quaranteed by the Fifth Amendment to the U.S. Constitution made applicable by th Fourteenth Amendment, as set forth in Waller v. Florida, 397 U.S. 387 (1970).

A Magistrate in Texas is defined as being both a Justice of the Peace and a Judge of the District Court. Art. 2.09 V.A.C.C.P.

The powers of a Magistrate to issue warrants are concurrent between a Justice of the Peace and a Judge of a District Court. Art. 7.01, V.A.C.C.P.; Ex Parte Wilson 214 S.W.2d 306 (Tex.Crim. App. 1948) Both Judges have the right to conduct the same proceedings when it appears from the evidence that defendant has committed a criminal offense. Art. 7.13, V.A.C.C.P.

Disturbing the peace is classified as a penal offense in Texas. P.C. Art. 474.

Peace bond proceedings are capable of being held before any Magistrate as defined by Art. 2.09 V.A.C.C.P., and are regarded as being criminal proceedings. In re Garner, 246 S.W. 371 (Tex. Crim.App. 1923).

were arms of the same sovereign. This opinion when applied to the procedure followed in Texas, and under the provisions of Art. 2.09, Art. 7.01, Art. 7.13, Art. 27.07 and Art. 37.07(1), V.A.C.C.P., necessitates a reversal of the trial court's action in not declaring that double jeopardy had attached, in not granting defendants' Motion for Instructed Verdict, in not charging the jury on Defendant McMillan's Special Plea and in not allowing the jury to speak as regards the Special Plea of Defendant McMillan. The judge invaded the province of the jury and in so doing denied the defendant of a meaningful trial by jury.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Criminal Appeals of Texas.

Respectfully submitted,

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MATTHEW DONALD JOHNSON and
MARION ERNEST McMILLAN, Appellants

Nos. 43,415 and 43,416 v. Appeal from Dallas County

THE STATE OF TEXAS, Appellee

OPINION

The offense is injuring property belonging to another, the extent of the injury being over fifty dollars; the punishment as to each appellant, ten (10) years.

The sufficiency of the evidence is challenged.

On July 1, 1968, at about 10:30 p.m., a group of 30 to 50 Negro people, many of them dressed in a manner somewhat different from the dress of the ordinary customer, entered the O.K. Super Market one at a time. Appellants McMillan and Johnson were the first of the group to enter the store. They went to all parts of the store while appellants walked to the back. At this point, the employees heard glass breaking in the area in which the appellants were standing.

Merchandise in the store was scattered, broken, mutilated, and commingled by the persons who had entered the store. Describing the scene, an employee stated:

> "There was milk and eggs all mixed together with cereal and sugar, watermelons and mustard, just most anything you could imagine was busted and broken."

Five minutes after they entered the store, the group left. Appellants were the last to leave. A partial listing of the destroyed merchandise, which had a value in excess of fifty dollars, includes: 3 one-gallon jugs of milk, 2 five-pound bags of sugar, 2 one-quart containers of mustard, over seventeen pounds of tomatoes, several cartons of eggs, four boxes of detergent, many bottles of pickles, two quarts of cooking oil, many watermelons, and 12 one-pound packages of oleo. An employee saw appellant Johnson break two bottles of grape juice and drop a watermelon twice. He also saw appellant McMillan take a gallon bottle of milk out of the dairy container and drop it, breaking the container.

Later the same evening, after the store was cleaned up, appellants re-entered the store, bought some beer and McMillan commented, "These white people sho keep a nice clean store."

We find the evidence is sufficient to support the verdict.

Appellants first contend that the trial court erred in refusing to disqualify himself and in refusing to grant their motion for continuance of the hearing on disqualification. In the testimony before the court, appellants showed that the trial judge, the Honorable James B. Zimmermann, was running for re-election in a contested race at the time of this trial. They also showed that the case was originally set in Judge Zimmermann's court, Criminal District Court No. 3, later transferred to Criminal District Court, then re-transferred to Criminal District No. 3. There is no showing that the judge was disqualified. Nothing is presented for review.

Appellants base their motion for continuance of the above described hearing on the absence of two witnesses, whose anticipated testimony they have failed to show. Therefore, nothing is presented for review. Belrose v. State, 242 S. W. 2d 378; Massoletti v. State, 303 S. W. 2d 412.

Appellants' second contention is that the trial judge erred in refusing to grant a continuance of the main trial. This motion was filed and heard on August 19, 1968, the day of the trial. The record shows that the indictments were filed on July 15, 1968. The principal basis for appellants' motion for continuance was that they needed until the next term of court to secure the attendance of two witnesses. There was no allegation or showing as to when these witnesses would be available.

Further, the motion for continuance stated that due to the fact that the applications to take depositions of some five witnesses were denied, the defendants needed more time to talk to and to locate these witnesses in order to prepare an adequate defense to the charges pending against them. There is an entire lack of showing of the diligence exercised by appellants in endeavoring to interview or locate such witnesses. No error is reflected. Rodele v. State, 254 S. W. 2d 122 and Burrell v. State, 446 S. W. 2d 323.

Appellants' third contention is that the trial court erred in refusing a change of venue and that the trial judge favored the State in the venue hearing

by admitting affidavits in lieu of witnesses. The testimony introduced by appellants at the venue hearing showed that appellants had been the subject of items on a news program of one of the major television stations in Dallas approximately four times in the preceding month; that a television newsman had read about them in the local newspapers eight to twelve times in recent months; that the appellants were newsworthy because they had opinions diverging from that of the majority of the public and because they had obtained an option to purchase a chain of grocery stores, one of which was the supermarket where the offense took place. Further testimony indicated that publicity, both in the newspapers and on television had shown that McMillan was a field secretary for the Student Non-Violent Coordinating Committee; that SNCC had a widespread reputation for being militant in black affairs; that there was publicity involving the incident at the supermarket out of which these charges arose; and that appellants' unusual manner of dress and hair style tended to cause a feeling of resentment among people in Dallas. Appellants also showed that they might be associated in the eyes of the public with destruction of property, interruption of business activities and conduct leading up to riots. All the defense witnesses testified that they were of the opinion that appellants could not receive a fair trial in Dallas County. However, they all testified that they could be fair and impartial jurors in Dallas County in spite of all the publicity with which they had come in contact.

In connection with the change of venue contention, it is well to observe that it was shown that Dallas County has a population of over one million persons. This is a far cry from what was before this Court in Rogers v. State, 236 S. W. 2d 141, and Richardson v. State, 70 S. W. 2d 1003, where the widespread publicity in a sparsely settled county required a change of venue. Further, this record shows efforts on the part of the trial court to restrict pre-trial publicity.

Rubenstein v. State, 407 S. W. 2d 793; Estes v. Texas, 381 U. S. 532; Sheppard v. Maxwell, 384 U. S. 333, and Coffman v. State, 136 S. W. 779, cited by appellants are readily distinguishable from the case at bar.

There is no showing in this record that there were inherently suspect

outside influences affecting the community's climate of opinion as to defendants which would result in a probability of unfairness. This is the test in the Fifth Circuit, Pamplin v. Mason, 364 F. 2d 1. The Court did not err in failing to grant the motion.

At the close of the evidence in the hearing on the motion for change of venue, the State introduced seven affidavits stating that the appellants' witnesses did not have sufficient knowledge on which to base their opinions that the appellants could not obtain a fair and impartial trial in Dallas County. Appellants objected to the introduction of these affidavits into evidence; the objection was overruled. Such affidavits controverted the source of knowledge of the appellants' witnesses, as is permitted by Art. 31.04, V.A.C.C.P. No affidavits were offered by the appellants.

Appellants next contend that they were denied a fair and impartial trial and due process of law in the selection of the jury. Particularly, they contend that their challenge to the array of jurors, request for attachment of absent summoned jurors and motion to shuffle the jury panel were improperly overruled.

The following facts are urged in support of appellants' challenge to the array and request for attachment. The records show that 618 prospective jurors were summoned for jury duty on the week of the trial. 195 of those were qualified as members of the panel for that week. It also appears that some 55 jurors were summoned but did not appear. Using 1960 census records, appellants showed that the total population of Dallas County was 811, 261 White persons and 137, 954 Black persons at the time of the census.

Appellants' figures show that out of the 618 prospective jurors who were summoned to serve, only 22 were from the predominantly Black South Dallas or West Dallas areas. Their calculations may also show that the percentage of White persons summoned and impaneled for jury duty was higher than the actual White-Black ratio of the total population for Dallas County, based on the 1960 census.

In regard to appellants' request for attachment of the absent summoned jurors, they alleged that they were denied an opportunity to be tried by a jury of their peers, as a result of the trial court's refusal to attach the absent summoned jurors. This allegation is based primarily on the fact that five of those prospective jurors resided within South Dallas and West Dallas.

At the time of the hearing regarding the jury selection, it was shown that this and all juries of Dallas County were drawn from the jury wheel in accordance with the law, and appellants were not able to show a single irregularity in the selection of the jury panel for the week. Mere showing that the jury panel does not exactly conform to racial percentages of the community does not establish systematic exclusion. Townsend v. Henderson, 405 F. 2d 324. Recently, the Fifth Circuit Court of Appeals had before them a contention similar to the one before us here. In U. S. v. Bigham, 421 F. 2d 1344, the contention was that the jury list for the week of his trial, with one exception, was composed of residents of Duval County, Florida, and that such list contained no resident of the appellant's home county. There the court quoted from an earlier opinion by said court as follows: "There is no constitutional requirement of proportional representation of the components of the community. Neither the jury roll nor the venire need be a perfect mirror of the community or accurately reflect proportionate strength of every identifiable group."

Appellants also requested the court to have the jury panel re-shuffled. They asked that the court shuffle the cards of the 195 jurors who appeared together with the 55 cards of the jurors who did not appear. The court ruled as follows:

> "The Court will make available to you at this moment all of the cards that are down in the Central Jury Room. You may shuffle them any way you see fit. Now, the Court is not going to make available the cards of jurors who are sitting as jurors in other Courts and the Court is not going to make available to you the cards of the fifty-five people who were summoned who did not appear, because those people have not been sworn, they are not here, they have not been qualified."

Appellants' counsel answered, "We do not desire that type of shuffle."

It appears that the court offered to give appellants more than they were entitled to and no error is reflected.

Appellants next contend that "the unusual nature of the case required individual voir dire examination, and in light of the record the trial judge's refusal was error and a denial of due process." Appellants relied upon Streight v. State, 138 S.W. 742. In Streight, supra, which was reversed on other grounds, this Court held that in an extreme case it would be reversible error for the trial court, on motion, to refuse to exclude the veniremen from the courtroom during the selection of a jury. However, we refused to reverse on that ground. Appellants once again cite Estes v. Texas, supra, and Sheppard v. Maxwell, supra. All three of these cases involved much more pre-trial publicity and prejudice than does the case at bar.

Appellants next contend that the trial court erred by not allowing defense counsel to ask prospective jurors certain questions on the voir dire examination. In the examination of one prospective juror, appellants' counsel asked the following question: "Do you allow your daughter to wear mini skirts?" The juror answered: "Yes, she wears --."

The court also refused to let the defense question a venirewoman, who was subsequently a juror, about her political affiliations, whether she was a Democrat or Republican. Appellants have failed to show this Court that the trial court abused his discretion in refusing to allow those questions and have failed to show how those questions were relevant to exercising their peremptory challenges.

Appellants were allowed to question one venireman, who subsequently became a juror, at some length about his understanding of the term "Black Power." Upon the State's objection, the court then instructed that the venireman be interviewed at the bench rather than have the entire jury panel hear the questions. Defense counsel then refused to ask any more questions regarding "Black Power" and, instead, he began to question the venireman regarding the range of punishment in the case.

Appellants' counsel later questioned another venireman, subsequently

a juror, regarding his idea of what the term "Black Power" meant. The State objected and the court sustained the objection. Defense counsel, however, continued questioning regarding the juror's definition of the term "Black Power." Under the circumstances, we fail to see that the trial court abused his discretion.

Appellants contend that the trial court erred in denying certain applications to take depositions. Appellants do not discuss this point or show how they were harmed by the court's denial of their applications.

Appellants next complain that they were denied the grand jury testimony of G. L. Hill, who did not testify at the trial. Their brief states that the testimony was not made available to them until April 10, 1970, the time of approving the record. However, it appears from the record that three days before the trial began, the court made the following order in regard to all grand jury testimony:

> "The Court will ask the State to produce it for the Court. The Court will keep it in its custody and at such time as the defense shows the Court that it has a need for it and a right to it, the Court will see to it that the defense is tendered the Grand Jury testimony."

Following this order, the voluminous record in this cause does not disclose another request for the grand jury testimony until after the trial. Appellants have failed to show that the trial court abused his discretion by failing to make the grand jury testimony available during the trial, particularly in light of the fact that Hill did not testify at the trial and that appellants have not shown that they attempted to talk to him, although they were given a list of all persons who testified before the grand jury.

Appellants next contend that the trial court overruled proper defense objections to questions asked by the state. The following is a typical excerpt from their brief:

> "Leading question (R. 536, Vol. 2, Part 5)"
>
> "Leading and suggestive (R. 637)"

This is followed by twelve similar statements. Such is not a proper ground of error under Art. 40.09, Sec. 9, V. A. C. C. P. McElroy v. State, 455 S. W. 2d 223.

Appellants' complaint as to argument revolves around the use of the word "riot" by the prosecutor. This is how the matter arose. The prosecutor stated, "-- they don't like the word 'riot' so we will have to use another word- ," with reference to the incident in the case at bar. The court promptly sustained the objection and instructed the jury to disregard the use of the term. We have concluded that the court was excessively careful, because the conduct of these appellants and their confederates clearly would have come within the terms of Art. 455, V. A. P. C., which defines a riot.

Appellants interposed further objection to this portion of the prosecutor's argument: "They were there they knocked over things, they were in cahoots with the rest of those criminals out there." Clearly the acts of the appellants and all of those acting in unison with them constituted a violation of the law. Had their associates been apprehended and tried, they would have been criminals. This we deduce to be a logical conclusion from the evidence.

Another portion of the argument complained of reads as follows:

> "Somebody sure as the devil bore the loss, but these two men should not be found guilty because O. K. Super Market was paid by an insurance company.
>
> "How reasonable is that? It's like saying, ladies and gentlemen, if SNCC decides to come out and burn your house--."

The objection was sustained and the jury was instructed not to consider the remarks. From the record it is clear that the prosecutor was attempting to rebut the defensive claim as he understood it; that since the O. K. Super Market had not used every conceivable means of salvage, the appellants were less guilty. The reference to SNCC was clearly within the record; the owner of the super market testified that a group called SNCC contacted him after this incident and wanted to buy the store, and that appellant McMillan was one of the group.

Appellants next complain about the following portion of the State's argument:

> "Now, I think perhaps, Mr. Perini's [defense counsel] closing remarks to the jury was that the Boston Tea Party was the beginning of a revolution. Perhaps it was. He made a very good analogy

there. He is saying that perhaps they had a right to go in and dump that tea overboard. Perhaps, ladies and gentlemen, this is the beginning of a revolution which occurred out at the O. K. Super Market. He is saying that they have got the right to go in there and to do that and if he wants to revolt--."

At this point, appellant objected without stating a reason. The objection was overruled. The State's attorney continued by saying:

"He is saying that they have got a right to go in there and destroy O. K. Super Market and if they want to revolt -- do we want a revolution in Dallas County, do we want to begin here?"

Objection was interposed and was overruled.

The prosecutor later argued: "... but let him identify what they are, they are revolutionists." Defense counsel's objection to this statement was also overruled.

This was indeed telling argument, but it was clearly invited by the following portion of the defense counsel's argument:

"What the whole story is about, what the whole context is is the ghetto gouger -- the ghetto gouging grocery store. We are not talking about thieves and robbers and irresponsible people, we are talking about people here pursuing a purpose and think about that when you deliberate back there and consider this case.

"'There is a dignity, a sublimity about the latest action of the second President of the United States and a signer of the Declaration of Independence.'

"John Adams wrote that in his diary. He is talking about an event which we now in retrospect realize was probably the most effective way to call attention to the English oppression in the American colonies. I am talking about the Boston Tea Party. I am talking about the willful destruction of property belonging to another without his consent, to-wit: thirty-five thousand pounds of English tea, perfectly good, dumped overboard by Paul Revere, John Hancock, Samuel Adams, sometimes known as the Father of the American Revolution....

"Was there an evil intention in those American Patriots in so doing? Is there evil intention in a labor boycott, a labor dispute, is that evil intent? Are we talking about thieves and robbers? These men aren't thieves and robbers, they are felons, you heard the charge."

No error is shown. Valdez v. State, 462 S. W. 2d 24.

The indictment, omitting the formal parts, charged that the appellants,

"acting together... did then and there unlawfully, wilfully and mischievously, and without the consent of the owner thereof, Joe F. Elston injure certain property, to-wit, 3 gallons of milk value of $1.18 each, 10 gallons of ice cream value of $.99 each etc.... by then and there opening containers of said property, throwing

scattering and intermingling the contents thereof which said injury to said property was then and there of the value of over $50.00 and the said Matthew Donald Johnson and Marion Ernest McMillan, acting together did then and there wilfully and mischievously injure and destroy such property without the consent of the aforesaid owner thereof...." (emphasis added)

We find no merit in the appellants' contention that the indictment was duplicitous. In Steambarge v. State, 440 S.W.2d 68, cited by appellants, the allegation that the indictment was duplicitous referred to the fact that "in the same count the offense of an attempt to injure and destroy as well as the completed offense is alleged..." See also Lacy v. State. 412 S.W.2d 911.

Appellants also allege that the indictment "is fundamentally defective because it does not allege that the property was destroyed or the extent of the injury," as required by Jones v. State, 377 S.W. 2d 205, and Barber v. State, 449 S.W.2d 53. Reference to the italicized portions of the indictment reveals that the indictment, although it is not a model indictment for this offense, does allege that the property was injured and destroyed and gives both the value of the property and the extent of the injury.

Appellants next contend that the evidence is insufficient to show injury or destruction by the manner and means alleged. The indictment described the damage in these words, "by then and there opening containers of said property, throwing scattering and intermingling the contents thereof...." Much of the evidence showed that the containers were broken. When a glass bottle is "broken," it is opened. We decline to undertake to count each separate item and set forth herein how it was destroyed or injured.

Appellants' next two grounds of error relate to the court's charge. Each ground groups several different contentions and cites no authority. They do not set forth separately each ground as is required by Art. 40.09, Sec. 9, V.A.C.C.P. and, therefore, we decline to discuss these contentions.

It is appellant McMillan's contention that he was entitled to a charge on former jeopardy. He bases this on the fact that he had a hearing by a justice of the peace on a peace bond. We find no merit in such contention.

Appellants next contend that the hearing on the motion for new trial

was a nullity because the same was not held within the 20 days provided by statute, citing Steward v. State, 422 S.W. 2d 733 and St. Jules v. State, 438 S.W. 2d 568. Their motion for new trial was based on jury misconduct and had an affidavit of a juror attached thereto. Appellants reason that when the motion was overruled by operation of law, it was automatically reversible error.[1]

In this case, the court granted the State a continuance of the hearing in order to have more time to secure evidence that jury misconduct had not, in fact, occurred. At the hearing, the court considered testimony and affidavits from the remaining eleven jurors, who stated that such misconduct did not occur.

In the interest of justice, the action of the court was proper in order to show that the affidavit attached to appellants' motion for new trial did not reflect the true facts.

Finding no reversible error, the judgment is affirmed.

Morrison, Judge

(Delivered April 14, 1971)

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[1] At the hearing on the motion for new trial, appellants refused to participate due to their contention that the hearing was a nullity.

CLERK'S OFFICE, COURT OF CRIMINAL APPEALS OF TEXAS

AUSTIN, TEXAS

I, GLENN HAYNES, Clerk of the Court of Criminal Appeals of Texas, do hereby certify that in Cause No. 43,416 styled:

MARION ERNEST MC MILLAN . Appellant

vs.

STATE OF TEXAS, Appellee

judgment of the CRIMINAL DISTRICT COURT NO. 3 OF DALLAS County, Texas, was affirmed on APRIL 14, 1971, Appellant's Motion for Rehearing was overruled, without written opinion, JUNE 9, 1971, and on JUNE 11, 1971 mandate issued.

THEREFORE, with the overruling of Appellant's Motion for Rehearing, this cause was disposed of by this Court on JUNE 9, 1971, appellant having exhausted all remedies in this, The Court of Criminal Appeals of Texas, and said judgment has now become final on the docket of this Court.

WITNESS my hand and Seal of said Court, at office, in Austin, Texas, this the 15TH day of JULY, A.D. 1971.

GLENN HAYNES, Clerk of the Court
of Criminal Appeals of Texas

Art. 2.09 [33] [41] [42] Who are magistrates

Each of the following officers is a magistrate within the meaning of this Code: The judges of the Supreme Court, the judges of the Court of Criminal Appeals, the judges of the District Court, the county judges, the judges of the county courts at law, judges of the county criminal courts, the justices of the peace, the mayors and recorders and the judges of the city courts of incorporated cities or towns. Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

Article 7.01 [79] [124] [114] Shall issue warrant

Whenever a magistrate is informed upon oath that an offense is about to be committed against the person or property of the informant, or of another, or that any person has threatened to commit an offense, the magistrate shall immediately issue a warrant for the arrest of the accused, that he may be brought before such magistrate or before some other named in the warrant. Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

Art. 27.07 [510] [574] [563] Special plea tried

All issues of fact presented by a special plea shall be tried by the trier of the facts on the trial on the merits. Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

Art. 31.03 [562] [628] [615] Granted on motion of defendant

A change of venue may be granted in any felony or misdemeanor case punishable by confinement on the written motion of the defendant, supported by his own affidavit and the affidavit of at least two credible persons, residents of the county where the prosecution is instituted, for either of the following causes, the truth and sufficiency of which the court shall determine:

1. That there exists in the county where the prosecution is commenced so great a prejudice against him that he cannot obtain a fair and impartial trial; and

2. That there is a dangerous combination against him instigated by influential persons, by reason of which he cannot expect a fair trial.

An order changing venue to a county beyond an adjoining district shall be grounds for reversal, if upon timely contest by defendant, the record of the contest affirmatively shows that any county in his own and the adjoining district is not subject to the same conditions which required the transfer. Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

Art. 35.17 Voir dire examination

1. When the court in its discretion so directs, in a misdemeanor or non-capital felony case, or in a capital case in which the state's attorney has made known that he will not seek the death penalty, the state and defendant shall conduct the voir dire examination of prospective jurors in the presence of the entire panel.

2. When the state's attorney has made known that he will seek the death penalty, the court shall propound to the entire panel of prospective jurors questions concerning the principles, as applicable to the case on trial, of reasonable doubt, burden of proof, return of indictment by grand jury, presumption of innocence, and opinion. Then, on demand of the State or defendant, either is entitled to examine each juror on voir dire individually and apart from the entire panel, and may further question the juror on the principles propounded by the court. Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

TEXAS STATUTES - VERNON'S ANNOTATED
CODE OF CRIMINAL PROCEDURE

Art. 37.07 [698] [770] [750] Verdict must be general; separate hearing on proper punishment

1. The verdict in every criminal action must be general. When there are special pleas on which a jury is to find, it must say in its verdict that the allegations in such pleas are true or untrue. If the plea is not guilty, it must find that the defendant is either guilty or not guilty.

Art. 40.05 [755] [839] [819] Time to apply for new trial; amendment

A motion for new trial shall be filed within ten days after conviction as evidenced by the verdict of the jury, and may be amended by leave of the court at any time before it is acted on within twenty days after it is filed. Such motion shall be presented to the court within ten days after the filing of the original or amended motion, and shall be determined by the court within twenty days after the filing of the original or amended motion, but for good cause shown the time for filing or amending may be extended by the court, but shall not delay the filing of the record on appeal.

A motion for new trial may be filed after the expiration of the term at which said conviction resulted, either during a new term of court or during vacation, and a motion for new trial may be determined in vacation or at a new term of c[illegible] and need not be determined during the term at which filed. Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

TEXAS STATUTES - VERNON'S ANNOTATED
PENAL CODE

Art. 1350. [1235] [791] [683] Injury or destruction of property of any kind belonging to another

(1) It shall be unlawful for any person to wilfully injure or destroy, or attempt to injure or destroy, any property belonging to another, of any kind whatsoever, without the consent of the owner and lienholder, if any, thereon.

(2) Whenever the law provides a particular punishment for the wilful injury or destruction by a certain means, such as by burning, or whenever a particular punishment is provided for wilful injury or destruction of a certain type of property, such as fences, the provisions of this Act shall not be applicable.

(3) Whoever shall violate the provisions of Subdivision (1) hereof shall be punished as follows:

(a) When the value of the property destroyed or the extent of the injury inflicted is of the value of Fifty ($50.00) Dollars, or over, he shall be confined in the penitentiary not less than two (2) nor more than twenty (20) years.

(b) When the value of the property destroyed or the extent of the injury inflicted is under the value of Fifty ($50.00) Dollars, he shall be fined not exceeding One Thousand ($1,000.00) Dollars or be confined in the county jail for not more than one (1) year, or be both fined and imprisoned.

(c) If any bodily injury less than death is suffered by any one by reason of the commission of the offense, the punishment may be increased so as not to exceed double that which is prescribed in cases where no such injury is suffered.

(d) Where death is occasioned by the offense, the offender is guilty of murder. Acts 1889, p. 35; Acts 1927, 40th Leg., p. 254, ch. 176, § 1; Acts 1951, 52nd Leg., p. 823, ch. 468, § 1.

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of September, 1971, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Mr. Henry Wade, District Attoreny, Dallas County Courthouse, Dallas, Texas, and three copies to Mr. Crawford Martin, Attorney General of the State of Texas, Capitol Station, Austin, Texas. I further certify that all parties required to be served have been served.

Frank P. Hernandez

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